(22,652)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 280.

THE GUARDIAN ASSURANCE COMPANY OF LONDON, LIMITED, PLAINTIFF IN ERROR,

vs.

DOMINGO QUINTANA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

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1 In the District Court of the United States for Porto Rico.

At a Stated Term of the District Court of the United States for Porto Rico, begun on the second Monday of October, being the 10th day of the month, in the year A. D. 1910.

Present the Honorable John J. Jenkins, Judge.

Among the proceedings had was the rendition of a judgment in the following case, to-wit:

DOMINGO QUINTANA, Plaintiff,

vs.

THE "GUARDIAN ASSURANCE COMPANY," LIMITED, OF LONDON, Defendant.

Be it remembered that heretofore, to wit, on the 8th day of September, 1910, there was filed in the Clerk's Office of said Court a certain complaint, which said complaint is as follows, to wit:

Complaint.

Now comes the plaintiff herein, Domingo Quintana by his attorneys, Hord & Scoville, and complaining of the defendant, the Guardian Assurance Company, Limited, of London, for cause of action alleges:

First. That the plaintiff is a citizen of Porto Rico and a resident thereof, and that the defendant is a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, authorized to do business in Porto Rico.

Second. That about the month of April, 1910, plaintiff bought from the Compania Agricola vasca de Yabucoa, a certain stock of merchandise and provisions, situated on the farm "Rosario" barrio Calabasa, Municipal jurisdiction of Yabucoa, Porto Rico,

2 upon which stock of goods and merchandise there existed on the date of said purchase, a policy of insurance against loss by fire, issued and executed by the defendant company in the sum of Four Thousand ($4,000.00) Dollars, being policy number 3,889,-884.

Third. That thereafter plaintiff increased and added to said stock of merchandise and provisions so bought as aforesaid and made the same a wholesale as well as a retail establishment, the value of said stock of merchandise and provisions so increased as aforesaid, being far in excess of Seven Thousand ($7,000.00) Dollars.

Fourth. That on or about the 24th day of June, in the year 1910, said policy of insurance was transferred by said Compania Agricola Vasca de Yabucoa to the plaintiff with the authority and consent of the defendant company and that on said date the defendant issued another policy of insurance against loss by fire, number 4,840,685, in the sum of Three Thousand ($3,000.00) Dollars to the plaintiff

on said stock of merchandise and provisions, including liquors for wholesale.

Fifth. That on or about the 25th day of July, 1910, said stock of provisions, merchandise and liquors was totally destroyed by fire without fault on part of the plaintiff and while said policies were still in force.

Sixth. That at the date of the destruction by fire of the said stock of goods and merchandise so insured by the defendant as aforesaid, the value of the same was far in excess of seven thousand ($7,000.00) Dollars.

Seventh. That under and by virtue of the insurance policies as aforesaid, the defendant became indebted to the plaintiff upon the destruction of said stock of merchandise by fire in the sum of Seven Thousand ($7,000.00) Dollars. Plaintiff gave notice to the defendant of the loss suffered by said fire, in accordance with the terms of said policy, and filed with its agents in San Juan, Porto Rico, a detailed statement of the goods and merchandise lost in said fire,
3 in so far as it was possible to do, but notwithstanding the proofs that the plaintiff has presented to said defendant as to his loss and the repeated demands that he has made upon said defendant and its agents for the payment of said sum of money, said defendant has failed and refused to pay the same and has not paid the same nor any part thereof.

Wherefore, plaintiff prays judgment against the defendant for the sum of Seven Thousand ($7,000.00) Dollars, together with interest thereon from this date and the costs of this suit.

(Signed) HORD & SCOVILLE,
Attorneys for Plaintiff.

Answer.

Filed October 14, 1910.

DOMINGO QUINTANA, Plaintiff,
vs.
THE GUARDIAN ASSURANCE COMPANY, LTD., OF LONDON, Defendant.

Answer.

The above named defendant, The Guardian Assurance Company, Ltd., of London, by its attorney, Francis H. Dexter, for answer to the complaint herein filed, says:

I.

It admits the allegations of Paragraphs "First" and "Second" of the said Complaint.

II.

It admits the allegations of paragraph "Fourth" of the said Complaint.

III.

Defendant denies each and every other allegation contained in the said Complaint except as herein admitted, modified or explained.

4 IV.

Defendant says that is is true that on the twenty-fifth day of July, 1910, a fire occurred in the house or store-room occupied by plaintiff in said "barrio" of Calabasa, District of Yabucoa, and that there was burned and destroyed by fire certain provisions covered by the policies of Insurance issued to plaintiff by the defendant company and described in the Complaint, but defendant avers and alleges, as it is reliably informed and as it verily believes, that the said fire was intentional and that it originated by the connivance and design of the plaintiff and those acting under his directions and instructions.

V.

Defendant further avers that at the time of the said loss, the stock of goods so destroyed did not exceed in value the sum of Three Thousand ($3,000) Dollars, and that the action of plaintiff in claiming of defendant the sum of Seven Thousand ($7,000) Dollars is part of a fraudulent and unlawful scheme to recover the total amount on said policies, when, in truth and in fact, the said fire was caused by the connivance and direction of plaintiff and the goods destroyed were worth only the sum above indicated.

VI.

Defendant further avers that plaintiff has failed and refused to deliver to it within the period of fifteen days from the date of said fire, a detailed statement of the loss suffered, setting forth in detail the character and value of the goods destroyed and verified by affidavit, all as required by Article X of the said Policies of Insurance; and defendants aver that the said Article has not been in any manner by defendant or its employees waived or modified and that it has constantly since the said fire demanded such statement.

VII.

Defendant further states that the Policy for Three Thousand ($3,000) Dollars issued on the twenty-fourth day of June,
5 1910, covered a stock of dry goods and provisions of all classes, including wholesole stocks of liquor in the possession of plaintiff as detailed, and defendant avers that at the time of the issuance of the said policy and thereafter and until the said fire, the plaintiff was engaged, without the knowledge or consent of defendant, in the distillation, manufacture and preparation of various alcoholic liquors upon the premises where the rest of the insured stock was kept. Defendant says that this constituted a false and misleading representation by plaintiff of the character of the property insured and of the risk assumed by the defendant company,—the risk being greater in the case of the manufacture and preparation of

alcoholic liquors than for the purchase and sale of the same in closed vessels.

Wherefore defendant prays judgment in its behalf with its costs herein most wrongfully expended.

(Signed) F. H. DEXTER,
Attorney for Defendant.

Service of a copy of the foregoing Answer acknowledged this fourteenth day of October, Nineteen hundred and ten.

(Signed) HORD & SCOVILLE.
M. A. B.

Motion for Order to Compel Production of Books.

Filed November 23, 1910.

DOMINGO QUINTANA, Plaintiff,
vs.
THE GUARDIAN LIFE ASSURANCE COMPANY, LIMITED, Defendant.

Defendant moves the Court for an Order upon the plaintiff requiring him to produce at the trial of this cause and also to permit at a reasonable time prior thereto an inspection of the letter-copy-book or copy-books kept by the plaintiff during the year 1910 in so far as they contain copies of the following letters and telegrams, to wit:

6 Letter dated May 28, 1910, addressed by plaintiff to Don Angel Suarez, San Juan, P. R.

Letter dated May 25 or 26, 1910, addressed to Don Antonio Garcia, Cintron, Yabucoa;

Letter dated May 25 or 26, 1910 addressed to Sres. Pons & Company, San Juan.

Letter dated May 26, 1910 addressed to Don J. J. Lopez, San Juan, P. R.

Telegram of June 2, 1910 addressed to Moreno, San Juan, relating to the shipment of 500 quintals of salt.

Copy of "borderó" appearing on page 193 of letter-book as of date June 13, 1910;

Letter dated June 16, 1910 addressed to Pons & Co., San Juan.

Letter dated June 27 1910, addressed to Sucesores de Frontera & Co., Ponce, P. R.

Letter dated June 28, 1910, addressed to Porto Rico American Tobacco Company, San Juan.

Letter dated June 28, 1910 addressed to Sucesores de Frontera & Co., Mayaguez, P. R.

Letter dated July 1, 1910 addressed to Pons & Co., San Juan.

Letter dated July 7, 1910 addressed to Don Aurelio Berrios & Co., San Juan, P. R.

Letter dated July 12, 1910 addressed to Francisco Gonzalez, Humacao.

Letter dated July 15, 1910 addressed to Sres. Gandina, Castañez & Co., San Juan, P. R.

Letter dated July 20, 1910 addressed to Piza Hnos., San Juan.
Telegrams dated July 25, 1910 addressed to Domingo Quintana, Hotel Comercio, San Juan.

Defendant states that the contents of the foregoing letters, telegrams and documents are pertinent and material to the issues in this cause and defendant requires them upon the trial hereof in order that justice may be done. Defendant, continuing, says that it only recently obtained knowledge of the said papers and documents.

Defendant further says that the said papers and documents will establish the insolvent condition of the plaintiff at the time of the fire in question and show the significant promises made by him to his creditors to discharge his indebtedness to them at a time
7 coincident with the burning of his establishment.

Defendant further moves the Court that plaintiff be compelled to produce at the trial and submit for inspection of attorney for defendant prior thereto, books of account kept by him from March first, 1910 to the present time relating to the store known as the "Vasca"—destroyed by fire.

(Signed) F. H. DEXTER,
Attorney for Defendant.

To Messrs. Hord & Scoville, Attorneys for Plaintiff:

You are hereby notified that the foregoing motion has been filed in the above entitled case and that the same will be called for hearing before the Court at 2 o'clock p. m. this day for an order as prayed.

You are further notified that upon failure to produce the book or books and copies desired, defendant will avail itself of the remedies authorized by law to enable it to submit to the Court and jury the contents of the letters and telegrams hereinbefore referred to.

San Juan, P. R., November 23, 1910.

(Signed) F. H. DEXTER,
Attorney for Defendant.

Copy Received at 11:20 A. M., Oct. 23, 1910.
(Signed) HORD & SCOVILLE.

8 *Order to Allow Inspection of Papers.*

Filed November 23, 1910.

DOMINGO QUINTANA
vs.
THE GUARDIAN ASSURANCE CO., LIMITED.

On this 23rd day of November, 1910, the defendant presents its motion for an order upon the plaintiff requiring him to produce at the trial of this cause, and also to permit at a reasonable time prior thereto an inspection of certain books and papers. Plaintiff appeared by his attorneys Messrs. Hord & Scoville.

Upon consideration of the motion and of the arguments of counsel in support of and in opposition thereto, the court grants the same, and hereby orders the plaintiff to produce at the trial of this cause the letter-copy-book or copy-books kept by him during the year 1910 in so far as they contain copies of the following letters and telegrams, to wit:

Letter dated May 28, 1910, addressed by plaintiff to Don Angel Suarez, San Juan, P. R.

Letter dated May 25 or 26, 1910, addressed to Don Antonio Garcia, Cintron, Yabucoa;

Letter dated May 25 or 26, 1910, addressed to Sres. Pons & Company, San Juan.

Letter dated May 26, 1910, addressed to Don J. J. Lopez, San Juan, P. R.

Telegram of June 2, 1910, addressed to Moreno, San Juan, relating to the shipment of 500 quintals of salt.

Copy of "border6" appearing on page 193 of letter-book as of date June 13, 1910.

Letter dated June 16, 1910, addressed to Pons & Co., San Juan.

Letter dated June 27, 1910, addressed to Sucesores de Frontera & Company, Ponce, P. R.

Letter dated June 28, 1910, addressed to Porto Rico American Tobacco Company, San Juan.

Letter dated June 28, 1910, addressed to Sucesores de Frontera & Company, Mayaguez, P. R.

9 Letter dated July 1, 1910, addressed to Pons & Co., San Juan.

Letter dated July 7, 1910, addressed to Don Aurelio Berrios & Co., San Juan, P. R.

Letter dated July 12, 1910, addressed to Francisco Gonzalez, Humacao.

Letter dated July 15, 1910, addressed to Sres. Gandina, Casteñez & Co., San Juan, P. R.

Letter dated July 20, 1910, addressed to Piza Hnos., San Juan.

Telegrams dated July 25, 1910, addressed to Domingo Quintana, Hotel Comercio, San Juan.

The court further orders plaintiff to produce at the trial all books of account kept by him from March 1, 1910, to the present time relating to the store known as the "Vasca," destroyed by fire.

It is further ordered that attorney for defendant be permitted to inspect all of the said books and documents before the trial of this cause.

November 23, 1910.

(Signed) JOHN J. JENKINS, *Judge.*

Journal Entry of November 25, 1910.

734. Law.

DOMINGO QUINTANA
vs.
THE GUARDIAN ASSURANCE CO. OF LONDON.

This cause comes on for trial, and comes the plaintiff in his own proper person and by his counsel Messrs. Hord & Scoville, and comes the defendant by its representative, Frederick Schomburg, and by its attorney Francis H. Dexter, and comes a jury, that is to say:

Emilio Chevermont,	E. A. Gildemiester,
Antonio Hernandez,	L. G. McGuigan,
N. L. Reed,	E. P. Hodges,
E. Gatell,	Justo Barros,
F. M. Pennock,	L. P. Le Hardy,
J. R. Latimer, Sr.,	Julio Marero,

twelve good and lawful men chosen from the body of the
10 District of Porto Rico, duly sworn, examined, and impanelled to try the issues joined between the parties. The witnesses for both sides are thereupon called, duly sworn, and placed under the exclusion rule, and the trial is proceeded with. And not being finished at the adjournment hour, the further hearing of the same is continued over until tomorrow morning at 9 o'clock A. M.

Journal Entry, November 26, 1910.

734. Law.

DOMINGO QUINTANA
vs.
GUARDIAN ASSURANCE CO.

Come the parties with their counsel as on yesterday. The jury is called and all found present and the trial of the cause is proceeded with. And at the conclusion of the testimony of the witnesses for the parties, the further hearing of the cause is continued over until the 28th instant at 9 o'clock A. M.

11 In the District Court of the United States for Porto Rico.

Law. No. 734.

DOMINGO QUINTANA
vs.
THE GUARDIAN ASSURANCE COMPANY, LIMITED, OF LONDON.

The Court's Instructions to the Jury.

The plaintiff in this action seeks to recover from the defendant the sum of $7,000.00 and interest, for insurance paid for by the plaintiff and furnished by the defendant, and the claim of the plaintiff is that in the month of March, 1910, the plaintiff purchased a stock of goods upon which there was a policy of insurance issued by the defendant company for $4,000.00, and that at the time of the purchase and sale, this policy of insurance was transferred to the plaintiff.

That plaintiff increased his stock of goods and obtained from the defendant an additional policy of insurance for $3,000 and converted the business into both wholesale and retail.

That on the 25th of July, 1910, both policies were in force and at that time the combined stock of goods so insured was worth in excess of $7,000.00, and that the entire stock of goods covered by the insurance was destroyed by fire.

And plaintiff further claims that before bringing this action, he had fully performed all of the conditions of the contracts upon his part to be performed.

Defendant on its part avers and alleges that it is reliably informed, and as it verily believes, that the said fire was intentional, and that it originated by the connivance and design of the plaintiff and those acting under his directions or instructions.

12 Now, upon that issue, upon that defence, the defendant company has the affirmative and must satisfy you by a preponderance of the evidence that this plaintiff, either directly or indirectly, caused the destruction of the stock of goods by fire in order to entitle it to the defence it has set up.

Defendant further avers and alleges that at the time of the loss, the stock did not exceed in value the sum of $3,000.

If you find from the evidence that this plaintiff, either directly or indirectly, caused the destruction of the stock of goods by fire, your verdict will be for the defendant and you will have nothing further to do in the case, but if you find from the evidence that the plaintiff did not, either directly or indirectly, cause the destruction of the stock of goods by fire, then your verdict will be for the plaintiff for the value of the stock of goods at the time of the fire, not to exceed the sum of $7,000.00, and interest on the value so found by you at the rate of six per cent per annum from September 8, 1910.

The testimony of Mr. Schomberg, the agent of the defendant company, that after making his investigation for the company, it offered to pay to plaintiff $3,500.00 or $4,000.00, can be considered

by you only in contradiction of his testimony and in connection with the allegation of incendiarism, and only for the purpose for which it was offered, that is, to show that the defendant company did not, after making its investigation, believe that the fire was of incendiary origin. The jury cannot consider said testimony for any other purpose whatsoever, and you are instructed that it cannot be considered to show an offer of compromise, as that would not be competent testimony.

13 *Stenographer's Certificate.*

I, Arthur J. Harvey, Official Stenographer of the District Court of the United States for Porto Rico, hereby certify that the foregoing document, consisting of two typewritten pages, is a true and correct transcript of the Court's instructions to the jury in the case of Domingo Quintana versus The Guardian Assurance Company, Limited, of London, given upon the first trial thereof in the above entitled court in the month of November, 1910.

ARTHUR J. HARVEY,
Official Stenographer of the District Court of the United States for Porto Rico.

14 *Journal Entry of November* 28, 1910.

734. Law.

DOMINGO QUINTANA
vs.
THE GUARDIAN ASSURANCE CO.

The trial of this cause is proceeded with as on yesterday, the jury being called and all found present. Thereupon counsel for the parties make their arguments to the jury, the court delivers to them its instructions, and they retire to their quarters in charge of the marshal, to consider of their verdict.

And thereafter, at 5:15 P. M., this same day the jury are called into court and asked if there is any probability that they will agree upon a verdict. And in reply they, by their foreman, state that there is not. The court thereupon directs that they again retire to their quarters for further consideration of their verdict.

Journal Entry of November 29, 1910.

734. Law.

DOMINGO QUINTANA
vs.
GUARDIAN ASSURANCE CO.

The jury in the above entitled cause come into court and are asked if there is any probability that they will agree upon a verdict,

and they by their foreman answer that there is not, and it appearing that said jury have been out since ten A. M. of the 28th instant, considering of their verdict, the court thereupon excuses them from further consideration of the cause. And it is directed that the said cause be placed upon the trial calendar.

15 *Journal Entry of December 2, 1910.*

DOMINGO QUINTANA
vs.
THE GUARDIAN ASSURANCE CO.

The trial of this cause is set for 10 A. M. December 3, 1910.

Motion of Defendant for Reasonable Time within Which to Prepare for Retrial of Above Case.

Filed December 3, 1910.

DOMINGO QUINTANA, Plaintiff,
vs.
THE GUARDIAN ASSURANCE COMPANY, Defendant.

Motion of Defendant to be Given a Reasonable Time within Which to Prepare for the Retrial of the Above Cause.

Defendant, the Guardian Assurance Company, represents to the Court that this cause became of issue on the fourteenth day of October, 1910, by the filing of an answer herein by defendant and that the regular October term, 1910 of this Court began on the Seventh day of November, 1910.

A jury being impanelled for the trial of causes at the said October term, this cause came on for hearing on the twenty-fifth day of November, and was not concluded until the twenty-ninth day of November, when the jury therein was discharged by this Court because it failed to agree upon a verdict.

Neither at the time of discharging the said jury nor until the morning of December 2, was any intimation or order made by the Court as to when this case would be retried.

Defendant avers that the uniform practice in this Court since the establishment thereof in 1900 has been that civil cases in which juries have failed to agree have been continued to the following Term, when a new and different jury would be empanelled for the trial thereof. The records of this Court will disclose such practice, which has been regarded by the Court and the Bar as equiva-

16 lent to a standing rule of Court.

Defendant represents that because of the matters and facts hereinabove just set forth, its attorney—Francis H. Dexter—dismissed its witnesses, nearly all of whom are working men residing in or near the town of Yaburoa, which is fifty miles distant from the City of San Juan, where this Court is held and between

which there is no railroad communication. The only communication possible for such witnesses and permitted by the legal mileage paid to witnesses is by means of vehicles hauled by horses.

Defendant says that the witnesses who testified at the former trial and whose testimony is required by defendant upon a retrial of this cause, are the following:

Florencio Alicea	Yabucoa
Evangelio Sanchez	"
Domingo Lebron	"
Eulalio Santiago	"
Juan de la Cruz	"
José Valladares	"
Felipe Arana	"
Agapito Vilaro	"
Gregorio Sagastibelati	"

Defendant represents that there appears on the docket of this Court the following cases at issue and for trial at this Term, which cases continue in the order hereinafter set forth the above entitled case of Domingo Quintana vs. The Guardian Assurance Company and which, in accordance with the uniform practice of this Court, should be tried before the retrial of this case.

The said cases are:

No. 553. Pedro J. Besosa vs. Generosa Candina, Breach of Contract, damages claimed $15,000.

No. 687. Rogelio Viso Lorenzo vs. The Porto Rico Sugar Co., Violation of Contract and damages issuing out of the same—Amount claimed, $5,000, Counsel's fees and costs.

No. 740. Eusebio Mojica vs. Mariano Gonzalez Lajo—Action to recover value of lands, rents and profits; Amount claimed $3,500 and costs.

17 No. 717. Marthina Cockrell vs. Wenceslao Borda, Jun'r, et al. Action to recover on contract for professional services. Amount claim- $3,005 and costs.

No. 651. Roy Brooks vs. Central Saint Jean. Personal injury. Damages claimed $7,000 and costs. (In this case there was a trial and disagreement of the jury at the last term.)

679. Bautisto Viso Lorenzo vs. The Porto Rico Sugar Co. Action to recover on contract. Amount claimed $1,840.27 and costs.

No. 680. Bautisto Viso Lorenzo vs. The Porto Rico Sugar Co. Action to recover for damages to the crop. Amount claimed $4,500 and costs.

No. 702. Manuel Ruiz vs. The American Railroad Company of Porto Rico. Libel and slander. Damages claimed, $10,000 and costs.

No. 711. Domingo Abad del Rosario et al. vs. Antonio Pira et al. Sought to recover real property and damages. $10,000 and costs.

No. 732. Juana Caban vs. The American Railroad Company of Porto Rico. Action for damages for death of husband of plaintiff. Amount claimed $10,000 and costs.

No. 741. Jovita Olivo vs. American Railroad Company of Porto

Rico. Action for damages for death of minor child of plaintiff. Amount claimed $15,000 and costs.

Defendant represents that on December 1st last at about 3 o'clock p. m., its attorney, Francis H. Dexter, received a visit at his office from Mr. F. H. Hord, one of the attorneys for the plaintiff, who asked defendant's attorney if defendant's agent in Porto Rico, Mr. Frederick Schomberg, was disposed to pay in full the policies of insurance sued on in this action. Defendant's attorney Dexter replied to the said Hord that, so far as he knew, it was not the intention or purpose of his client to pay the said policies. Thereupon, the said Hord stated to Defendant's attorney Dexter that he would ask for a setting of the case for retrial immediately, further remarking that defendant's attorney Dexter should be present in Court the following morning, as he would ask for such setting. Defendant's attorney replied that he was at that moment leaving for Coamo
18 Springs to visit his wife and a sick child who had been for some weeks at that place and that while he, the said Dexter, expected to return the following day, he was not certain that he would be able to return in time to attend the Court. He requested the said Hord to make a motion in due form as required by Civil Procedure and the practice governing such matters in the Courts of Porto Rico.

Defendant represents that defendant's attorney, the said Dexter, departed for Coamo Springs at about a quarter after three of the same afternoon of December 1st and did not return to San Juan until about some time the following December 2nd; that being in his office between 3:30 and 4 o'clock, he was given a telephonic call by Mr. A. J. Harvey, the stenographer of the Court, who spoke to him concerning the preparation of the transcript of the testimony of the witnesses given at the former trial; and in the course of the conversation the said Harvey notified the said Dexter that this case was set for trial for December 3 at 9 a. m.

Defendant represents that its said attorney Dexter visited the Court immediately and learned that the attorney for plaintiff, the said Hord, had on the morning and in the absence of defendant's attorney Dexter requested a trial of this cause on the following day and that the Court had so ordered.

Defendant represents that the information received by its attorney Dexter late in the afternoon of the second instant, was the first notice that it or its said attorney had from the Court that this case was to be retried at this present Term and at so early a date.

Defendant says that it is impossible to obtain the presence of its witnesses at the trial of this cause on the third of December,
19 because of the distance and of the difficulty that would naturally ensue in finding its witnesses, who are scattered on various farms and in various settlements about the town of Yabucoa.

Defendant further states that on the second day after the trial of this cause, its attorney ordered from the official stenographer of this Court a complete transcript of all the testimony given on the trial hereof for the purpose of preparing for a retrial, but that the said stenographer has not yet been able to complete said transcript.

Defendant says that if it be forced to a trial on the day so fixed as aforesaid by the Court, it will be deprived of the opportunity to make a defense in this cause and that it will be denies a fair and impartial trial.

Defendant prays therefore, under the circumstances, that if the Court should, in the exercise of its discretion, see fit to depart from the rule and practice of long standing, above referred to, and require this cause to be tried at or during the present Term, that it shall give to the defendant at least five days within which to bring its witnesses to the trial.

Defendant further represents that in the ordinary course, the cases above set forth, the trial of which was set to follow the first trial of this case, will consume at least a week in their trial and submission to the jury.

GUARDIAN ASSURANCE COMPANY,
By F. H. DEXTER, *Attorney.*

Francis H. Dexter, being sworn, upon his oath says that the matters and facts above set forth are true as he veritably believes.

(Signed) F. H. DEXTER.

Subscribed and sworn to before me this Third day of December, 1910.

RAFAEL GUILLERMETY, *Clerk,*
By N. V. COLBURN, *Deputy.*

20 *Journal Entry of December* 3, 1910.

734. Law.

DOMINGO QUINTANA
vs.
GUARDIAN ASSURANCE CO.

This case is again called for trial, the jury not having been able to agree and report in the previous trial. And thereupon F. H. Dexter, attorney for the defendant company, begs leave to file a motion asking for a postponement of the trial on account of the short time at his disposal to prepare the defense in the case. The motion is heard and the court being fully advised in the premises overrules the same, to which ruling of the court the defendant duly objects and excepts.

A jury then comes, who are duly examined, sworn and impanelled to try the cause, that is to say: F. D. Amador, Nathaniel Pasarell, P. M. McCormick, M. A. Saldaña, W. C. Fricker, W. O. Johnson, E. J. Hinckley, F. H. Johnson, J. R. Loubierl, Roman Romanant, Luis Guillermety, B. W. Wickes, twelve good and lawful men, chosen from the body of the district of Porto Rico.

Thereupon Francis H. Dexter, attorney for the defendant, retires from the Court Room.

The witnesses for the plaintiff are called in, sworn, and give their testimony. And on default of any defense in the case the jury is

directed by the court to bring in a verdict for the plaintiff in the amount claimed in the complaint which said verdict is as follows:

"We, the jury, under the direction of the court, find for the plaintiff and assess his damages in the sum of $7,000.00, Seven Thousand Dollars, and interest from September 28, 1910, at 6% per annum.

P. M. McCORMICK, *Foreman.*"

21 Which said verdict is ordered to be filed and entered of record. And thereupon the jury is discharged from further consideration of the cause. And therefore it is considered that the plaintiff, Domingo Quintana, recover from the defendant, the Guardian Assurance Company, the sum of Seven Thousand Dollars and interest from September 28, 1910, at 6% per annum, and for which execution may issue.

Petition for Writ of Error and Supersedeas.

Filed Dec. 13, 1910.

DOMINGO QUINTANA, Plaintiff,
vs.
THE GUARDIAN ASSURANCE CO., Defendant.

The Guardian Assurance Company, defendant in the above entitled cause, feeling itself aggrieved by the verdict of the jury and the judgment entered on the third day of December, 1910, comes now and petitions the said Court for an order allowing it to prosecute a Writ of Error to the honorable, the Supreme Court of the United States under and according to the laws of the United States in that behalf made and provided, and also that an Order be made fixing the amount of security that the defendant shall give and furnish upon said Writ of Error, and that, upon the giving of such security, all further proceedings in this Court be suspended and stayed until the determination of said Writ of Error by the Supreme Court of the United States, and your petitioner will ever pray, etc.

(Signed) WILLIS SWEET,
Attorney for Defendant.

22 *Assignment of Errors.*

Filed December 13, 1910.

DOMINGO QUINTANA, Plaintiff,
vs.
THE GUARDIAN ASSURANCE CO., Defendant.

Comes now the defendant in the above entitled cause and assigns as error herein the action of the Court in proceeding to a retrial of this cause on the third day of December, 1910, and in overruling the motion of defendant for a reasonable time within which to pre-

pare for the retrial of this cause, to which action of the Court, defendant, by its counsel, then and there duly excepted.

Wherefore defendant prays for a reversal of the judgment entered herein on the third day of December, 1910.

(Signed) WILLIS SWEET,
Attorney for Defendant.

Order Allowing Writ of Error.

Filed Dec. 13, 1910.

DOMINGO QUINTANA, Plaintiff,
vs.
THE GUARDIAN ASSURANCE CO., Defendant.

On this the tenth (10) day of December, 1910, the same being the same term at which the judgment in the above entitled cause was rendered, defendant presented its petition for Writ of Error and an Assignment of Errors for purposes of obtaining a Writ of Error to review the judgment entered in this cause and said defendant requested the Court to fix a supersedeas bond for such purpose. It is therefore,

Ordered that a Writ of Error be and hereby is allowed to
23 have reviewed in the Supreme Court of the United States the judgment heretofore entered herein, and that the amount of suprsedeas bond on said Writ of Error be, and hereby is, fixed at $11,000.00 (Eleven thousand dollars).

(Signed) JOHN J. JENKINS, *Judge.*

Journal Entry of December 19, 1910.

734. Law.

DOMINGO QUINTANA
vs.
THE GUARDIAN ASSURANCE CO.

Now comes Willis Sweet, Esq., representing the defendant herein, and tenders for the approval of the Court the supersedeas bond on Writ of Error, as per order hereinbefore entered.

Order Rejecting Bond.

The defendant in this action having appeared in court by its attorneys and made an application for the approval of the foregoing bond for the purpose of appeal to the Supreme Court of the United States and the plaintiff having also appeared and objected to the approval of the bond for the reason that it was no security in addition to the defendant itself, and for the further reason that a partner has no im-

plied authority to bind the firm by contract of guaranty or suretyship and the plaintiff's attorney having stated in open court that he had examined the articles of co-partnership and that the articles did not authorize a contract of guaranty or suretyship by the firm and that one of the partners was a non-resident of the United States, residing in Spain, the court sustained the objection of the plaintiff and refuses to approve the bond.

Dated December 17, 1910.

(Signed) JOHN J. JENKINS, *Judge.*

24 *Journal Entry of December* 21, 1910.

734. Law.

DOMINGO QUINTANA
vs.
THE GUARDIAN ASSURANCE CO.

Now comes the Guardian Assurance Company, by its agents, Villar & Co., represented by Willis Sweet, Esq., and tenders a bond on writ of error herein, which said bond being duly examined by the Court, is approved on this, the 25th day of December, A. D. 1910. same to act as a supersedeas, that is to say:

In the District Court of the United States for Porto Rico, Sitting at San Juan.

DOMINGO QUINTANA, Plaintiff,
vs.
THE GUARDIAN ASSURANCE COMPANY, Defendant.

Bond on Writ of Error.

Know all men by these presents that we, The Guardian Assurance Company, as principal, and Carlos Conde and Miguel Cuetara, as sureties, are held and firmly bound unto Domingo Quintana, plaintiff in the above entitled action, in the sum of Eleven Thousand ($11,000) Dollars, to be paid to the said Domingo Quintana, his executors, heirs, administrators, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated the nineteenth day of December, 1910.

Whereas the above named defendant, The Guardian Assurance Company, has sued out a Writ of Error in the Supreme Court of the United States to reverse the judgment in the above entitled cause by the District Court of the United States for Porto Rico,

25 Now, therefore, the condition of this obligation is such that if the above named Guardian Assurance Company shall

prosecute said writ to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and virtue.

GUARDIAN ASSURANCE COMPANY,
(Signed) By VILLAR & CO., *Agents.*

(Signed) C. CONDE, *Surety.*
MIGUEL CUETARA, *Surety.*

Carlos Conde, being duly sworn, upon his oath says that he is one of the sureties in the foregoing bond; that he is worth in visible assets in this jurisdiction more than the amount of the foregoing bond.

(Signed) C. CONDE.

Subscribed and sworn to before me this nineteenth day of December, 1910.

(Signed) RAFAEL GUILLERMETY,
Clerk U. S. Dist. Court for P. R.,
[SEAL.] By RICARDO NADAL, *Deputy.*

Miguel Cuetara, being duly sworn, upon his oath says: That he is one of the sureties mentioned in the foregoing bond; that he is worth in visible assets in this jurisdiction more than the amount of said bond.

(Signed) MIGUEL CUETARA.

Subscribed and sworn to before me this nineteenth day of December, 1910.

[SEAL.] (Signed) RAFAEL GUILLERMETY,
Clerk U. S. Dist. Court for P. R.,
By RICARDO NADAL, *Deputy.*

Approved this 21st day of December, A. D. 1910.

(Signed) JOHN J. JENKINS, *Judge.*

26 *Præcipe for Record on Appeal.*

Filed Jan. 9, 1911.

JANUARY SIXTH, 1911.

Mr. Rafael Guillermety, Clerk U. S. Court:

Please prepare for me at the earliest convenience of your office a certified transcript of the record in the case of Domingo Quintana versus The Guardian Assurance Company.

This transcript should include:

The Complaint.

The Answer.

Motion to produce books and papers.

The order made thereon.

All journal entries showing subsequent proceedings in both the first and second trials, but not including any proceedings in the contempt cases.

The instructions given by the court in the first trial.

Motion of defendant for time to prepare for second trial and order overruling same, showing exception taken thereto.

Verdict and judgment in second trial.

All journal entries since judgment.

Please have two carbon copies made of this transcript as I can use them.

(Signed) WILLIS SWEET.

Petition for Writ of Error.
Assignment of errors.
Bond and approval.
Order allowing writ.
Writ of error.
Citation.
Clerk's Certificate.

27 *Journal Entry of January 25, 1911.*

734. Law.

DOMINGO QUINTANA
vs.
THE GUARDIAN ASSURANCE CO.

By consent of the respective attorneys for the parties in the above entitled cause, the hearing of the objections to the bill of Exceptions filed in this cause is set for to-morrow, Thursday, January 26, 1911, at 10 o'clock A. M.

Order Continuing until Next Term of Court the Allowance and Approval of Bill of Exceptions.

Filed April 4, 1911.

734. Law.

DOMINGO QUINTANA
vs.
THE GUARDIAN ASSURANCE CO.

In view of the illness of the Judge of this Court it is hereby ordered that the allowance and approval of the Bill of Exceptions in the above entitled cause, heretofore under consideration, is hereby continued over to the approaching April term of this Court.

(Signed) JOHN J. JENKINS, *Judge.*

28 In the District Court of the United States for Porto Rico.

734. Law.

DOMINGO QUINTANA
vs.
THE GUARDIAN ASSURANCE CO.

I, Rafael Guillermety, Clerk of the District Court of the United States for Porto Rico, do hereby certify the foregoing pages, numbered from 1 to 27 inclusive, to be a true and correct copy of certain proceedings in the above-entitled cause, as the same remain of record and on file in my office, as called for by the præcipe filed by counsel for the appellant, copy of which præcipe is attached hereto.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, this 21st day of April, A. D. 1911.

[Seal United States District Court for the District of Porto Rico.]

RAFAEL GUILLERMETY,
Clerk U. S. District Court for Porto Rico.

29 [Endorsed:] No. 734. Law. In the District Court of the United States for Porto Rico. Domingo Quintana vs. The Guardian Assurance Co.

30 In the Supreme Court of the United States.

734. Law.

DOMINGO QUINTANA
vs.
THE GUARDIAN ASSURANCE COMPANY OF LONDON, LIMITED.

Writ of Error.

The President of the United States to the Honorable Judge of the District Court of the United States for Porto Rico, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, between Domingo Quintana, plaintiff, and The Guardian Assurance Company of London, Limted, defendant, a manifest error has happened to the great damage of the said Guardian Assurance Company, as by their petition appears. We being willing that error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States

Supreme Court, together with this writ, so that you have the same at Washington on or before the 15th day of March, next in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

31 Witness the Honorable Edward D. White, Chief Justice of the United States Supreme Court, this tenth day of January, A. D. 1911, and in the one hundred and thirty-fifth year of the Independence of the United States of America.

Allowed by—

JOHN J. JENKINS,
U. S. Judge for the District of Porto Rico.

Attest:

[Seal United States District Court for the District of Porto Rico.]

RAFAEL GUILLERMETY,
Clerk of the District Court of the United States for Porto Rico.

32 [Endorsed:] No. 734. Law. In the District Court of the United States for Porto Rico. Domingo Quintana vs. The Guardian Assurance Co. Writ of Error.

33 #1021.

Citation.

UNITED STATES OF AMERICA,
District of Porto Rico, ss:

In the United States Supreme Court.

To Domingo Quintana, Defendant, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Supreme Court to be holden at the city of Washington on the 15th day of March next, pursuant to a writ of error, filed in the Clerk's Office of the District Court of the United States for Porto Rico, wherein the Guardian Assurance Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John J. Jenkins, Judge of the District Court of the United States for Porto Rico, this 10th day of January, in the year of our Lord one thousand nine hundred and ten,

and of the Independence of the United States the one hundred and thirty-fifth.

[Seal United States District Court for the District of Porto Rico.]

JOHN J. JENKINS,
J. S. Judge for Porto Rico.

34 Form No. 282.

Return on Service Writ.

UNITED STATES OF AMERICA,
The District of Porto Rico, ss:

I hereby certify and return that I have served the annexed Citation on the therein-named Domingo Quintana by handing to and leaving a true and correct copy thereof with Domingo Quintana personally at San Juan in said District on the 10th day of January, A. D. 1911.

H. S. HUBBARD,
U. S. Marshal.
T. E. BURNETT, *Deputy.*

35 [Endorsed:] No. 734. Law. In the District Court of the United States for Porto Rico. Domingo Quintana vs. The Guardian Assurance Co. Citation. Marshal's Fees: 1 Service, $2.00; Expenses, —.

Endorsed on cover: File No. 22,652. Porto Rico D. C. U. S. Term No. 280. The Guardian Assurance Company of London, Limited, plaintiff in error, vs. Domingo Quintana. Filed May 3d, 1911. File No. 22,652.

White Supreme Court, U. S.
FILED.
OCT 26 1912
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 280.

THE GUARDIAN ASSURANCE CO. LTD. OF LONDON,
PLAINTIFF IN ERROR,

vs.

DOMINGO QUINTANA, DEFENDANT IN ERROR.

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF.

HECTOR H. SCOVILLE,
C. L. BOUVÉ,
For Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 280.

THE GUARDIAN ASSURANCE CO. LTD. OF LONDON,
PLAINTIFF IN ERROR,

vs.

DOMINGO QUINTANA, DEFENDANT IN ERROR.

MOTION TO DISMISS OR AFFIRM.

Comes now Domingo Quintana, defendant in error, and respectfully moves the court to dismiss the writ of error in the above-entitled cause on the ground that the record therein is defective in that it contains no bill of exceptions.

Or, should the court see fit to deny the above motion to dismiss, the defendant in error moves to affirm the judgment of the court below on the ground that it is manifest that the writ of error issued in this case was taken for delay only.

HECTOR H. SCOVILLE,
C. L. BOUVÉ,
For Defendant in Error.

To the attorney of record for the plaintiff in error in the above-entitled case:

You are hereby notified that the defendant in error in the above-entitled case will on Monday, the 18th day of November, A. D. 1912, on the meeting of the Supreme Court of the United States for that day, or as soon thereafter as counsel may be heard, submit for the consideration of the court the foregoing motion and the brief thereon hereto attached.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 280.

THE GUARDIAN ASSURANCE CO. LTD. OF LONDON,
Plaintiff in Error,

vs.

DOMINGO QUINTANA, *Defendant in Error.*

Brief in Support of Motion to Dismiss or Affirm.

Comes now the defendant in error and in support of the above motion to dismiss or affirm respectfully says:

On the 3d day of April, 1911, of the October term, 1910, defendant in error filed his motion to docket and dismiss this case, having produced and filed with the clerk of this court the certificate required by rule 9. On Monday, April 24, 1911, said motion was denied by this honorable court in an order reading as follows:

> "GUARDIAN ASSURANCE COMPANY LIMITED OF LONDON, *Plaintiff in Error,*
> *vs.*
> DOMINGO QUINTANA.
>
> "Motion to docket and dismiss denied without prejudice to a renewal of same if case is not docketed within a reasonable time after the bill of exceptions is settled."

Thereafter and on the 3d day of May, 1911, the case was docketed.

The record now docketed and before this court is certified

to by the clerk of the District Court for Porto Rico as follows:

> "I, Rafael Guillermety, * * * do hereby certify the foregoing pages, numbers 1 to 27, inclusive, to be a true and correct copy of certain proceedings in the above-entitled cause, as the same remain of record on file in my office as called for by the præcipe filed by counsel for the appellant, copy of which præcipe is attached hereto." * * *

There is nothing in the papers to show that a copy of the præcipe was served on the appellee or defendant in error or his counsel, as provided by paragraph 1 of rule 8 of this court.

The step following the filing of the præcipe appears by Journal entry of January 25, 1911:

> (Title of Cause.)
>
> By consent of the respective attorneys for the parties in the above-entitled cause the hearing of the objections to the bill of exceptions filed in this cause is set for tomorrow, Thursday, Jan. 26th, 1911, at 10 o'clock.

As appears from the papers docketed here and from the certificate of the clerk of the United States District Court for Porto Rico, hereinafter appearing as "Exhibit A," the bill of exceptions was still unsettled on April 3, 1911, the date of the motion of the defendant in error to docket and dismiss. The order denying that motion appears to have looked toward the prompt settlement of the bill of exceptions and the docketing of the record within a reasonable time thereafter. No bill of exceptions has ever been filed by the plaintiff in error in this case, nor has the plaintiff ever settled or attempted to settle said bill, although over two full terms have passed since the issuance of said order by this court, all of which fully appears from the following certificate of the clerk of the District Court of the United States for Porto Rico, herein designated as "Exhibit A" and filed as an original exhibit in support of this motion:

IN THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

No. 734. Law.

DOMINGO QUINTANA, *Plaintiff*,

vs.

THE GUARDIAN ASSURANCE COMPANY LIMITED OF LONDON, *Defendant*.

I, Rafael Guillermety, clerk of the District Court of the United States for Porto Rico, hereby certify that judgment was entered in the above-entitled cause in favor of the plaintiff and against the defendant the third day of December, 1910, in the sum of seven thousand dollars ($7,000) and interest.

I further certify that on the tenth day of January, 1911, a writ of error to the Supreme Court of the United States was signed by the judge of this court, a supersedeas bond having been approved by the court.

I further certify that on the sixteenth day of February, 1911, a bill of exceptions was tendered by the defendant and plaintiff in error in said cause, and that thereafter on the twentieth day of February, 1911, objections to the approval of said bill of exceptions were filed by the plaintiff.

I further certify that on the fourth day of April, 1911, an order was entered on the Journal of said court containing the hearing of the objections to said bill of exceptions and the allowance on approval of the same until the April term, 1911, of this court. A true and correct copy of said order being as follows:

Order Continuing Until Next Term of Court the Allowance and Approval of Bill of Exceptions.

In view of the illness of the judge of this court it is hereby ordered that the allowance and approval of

the bill of exceptions in the above-entitled cause, heretofore under consideration, is hereby continued over to the approaching April term of this court.

(Signed) JOHN J. JENKINS, *Judge.*

I further certify that the April term of this court was opened pursuant to order of court on the fourteenth day of August, 1911, the Hon. Paul Charlton presiding, and that said term was closed on the seventh day of October, 1911, without any action being taken in regard to the approval of said bill of exceptions and without any request being made therefor. A general order was entered at the close of said term as follows:

In re Continuance of Cases.

Order.

And now on this 7th day of October, A. D. 1911, this being the last day of the April, 1911, term of this court in this district, it is

Ordered, that any and all matters not finally determined or settled, and rights which should or may be lost by the lapsing of the term, are hereby continued until the next term, to all intents and purposes as if the numbers and titles of the same were herein set out.

Given on this 7th day of October, A. D. 1911.

(Signed) PAUL CHARLTON, *Judge.*

I further certify that the October term, 1911, of this court was opened on Monday, October 9, 1911, and was adjourned without day on April 13, 1912.

I further certify that no action has been taken by this court in regard to the approval and allowance of said bill of exceptions up to the present time; that the objections thereto have never been heard, and that no request has ever been presented to the court for the approval and allowance of said bill of exceptions as appears from the records of the court since the fourth day of April, 1911.

In witness whereof I have hereunto set my hand and affixed my official seal this 4th day of October, A. D. 1912, in the one hundred and thirty-seventh year of the Independence of the United States of America.

Attest:

RAFAEL GUILLERMETY, *Clerk*,

[SEAL.] By SUSANNA ALDAO, *Deputy*.

In the order of this court of April 24, 1911, it is specifically made to appear that the motion to docket and dismiss was denied on the assumption that the plaintiff in error would settle the bill of exceptions and docket the case within a reasonable time thereafter. The order certainly did not look to the docketing of papers containing in themselves nothing on which this court could pass, or the continued failure on the part of the plaintiff in error for more than a year and a half to take steps in the District Court of Porto Rico, which would enable him to settle the bill of exceptions and docket the case in accordance with the terms of the order.

It is respectfully urged that the facts herein shown constitute ample ground for a dismissal of the writ of error, or for affirmance on the ground that it is obvious that the writ was taken for delay only.

Respectfully submitted,

HECTOR H. SCOVILLE,
C. L. BOUVÉ,
For Defendant in Error.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 280.

THE GUARDIAN ASSURANCE COMPANY OF LONDON, LIMITED, PLAINTIFF IN ERROR,

vs.

DOMINGO QUINTANA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

STATEMENT.

This was an action at law by Domingo Quintana, as plaintiff, to recover from The Guardian Assurance Company, Limited, defendant below and plaintiff in error here, the amount of two certain fire insurance policies aggregating $7,000. The

In

execution of the policies and the destruction by fire of the goods insured was admitted by defendant, but liability to pay was denied on the ground that the fire "was intentional" and "originated by the connivance and design of the plaintiff and those acting under his directions and instructions," and that in any event the true value of the goods insured did not exceed "the sum of three thousand ($3,000) dollars" (R., 3).

The issues thus raised first came on for trial before the Honorable John J. Jenkins, United States District Judge for Porto Rico, and a jury November 25, 1910 (R., 7), and "at the conclusion of the testimony of the witnesses for the parties" and under appropriate instructions by the court the case was submitted to the jury for its verdict on November 28, 1910 (R., 9). Failing to agree upon a verdict the jury was discharged November 29, 1910, and the cause directed to "be placed upon the trial calendar" (R., 10).

December 2, 1910, without other notice to the defendant or its attorney of record, the retrial of the case was peremptorily set for the following day, viz., December 3, 1910, at 10 o'clock a. m. (R., 10).

On the day so fixed for the retrial of the case the attorney for defendant, by a written motion duly filed in the cause, called the attention of the court to the "uniform practice" existing from the establishment of the court, in 1900, under which "civil

cases in which juries have failed to agree have been continued to the following term, when a new and different jury would be empaneled for the trial thereof," and to the further fact that because of the known existence of such practice, the witnesses for defendant, nearly all of whom are workingmen residing in or near the town of Yabucoa (where the alleged loss occurred), which is fifty miles distant from the city of San Juan, where this (district) court is held, and between (R., 10) which (points) there is no railroad communication;" had been discharged from further attendance and had returned to their homes, the only permissible and possible "legal mileage" under which they could be returned to the court, being "by means of vehicles hauled by horses" (R., 11); that if forced to trial on the day fixed by the court the defendant would "be deprived of the opportunity to make defense in this cause and will be denied a fair and impartial trial" (R., 13).

The names and residences of the desired witnesses were specified in the body of the motion, as were also the numbers and titles of other cases at issue and pending for trial at the then current term, "which, in accordance with the uniform practice of this (district) court, should be tried before the retrial of this case" (R., 11), and it was prayed that

> "if the court should in the exercise of its discretion, see fit to depart from the rule and practice of long standing, above re-

ferred to, and require this cause to be tried at or during the present term, that it shall give to the defendant at least five days within which to bring its witnesses to the trial" (R., 13).

It appears from the journal entry of December 3, 1910 (R., 13), that upon the call of the case for further trial the attorney for the defendant brought the above motion to the attention of the trial court, by which same was promptly overruled, and to this "ruling of the court the defendant duly objects and excepts" (R., 13).

A jury having been empanelled and sworn to retry the cause, the attorney for defendant retired from the court-room, and the witnesses for plaintiff having given their testimony, in "default of any defense in the case the jury is (R., 13) directed by the court to bring in a verdict for the plaintiff in the amount claimed in the complaint," which was done, and judgment, with execution, immediately entered thereon (R., 13).

Within ten (10) days thereafter defendant prayed and was allowed a writ of error from this Honorable Court to operate as a *supersedeas* upon the giving of bond in the sum of $11,000 (R., 15). Such bond was tendered and approved December 21, 1910 (R., 17).

A bill of exceptions (form not shown) was subsequently (February 16, 1911) tendered on

behalf of the defendant company for settlement, and the hearing of objection thereto was set by consent for January 26, 1911 (R., 18). Apparently the court was unable to settle the same on the day so fixed, for it appears that on the 4th of April, 1911, and "In view of the illness of the judge of this (district) court," the court ordered that the matter be "continued over to the approaching April term of this (district) court" (R., 18).

The writ of error, citation and the proof of service of the latter all bear date of January 10, 1911 (R., 20).

April 3, 1911, in the above posture of the matter the defendant in error here, Quintana, moved this Honorable Court to docket and dismiss the cause under Rule 9 of the Rules of Practice. That motion was denied April 24, 1911, in the terms set forth on page *3* of defendant in error's "Brief in support of motion to dismiss or affirm."

April 5, 1911, the day after the entry of the above order of continuance, the learned trial judge (Jenkins) left Porto Rico for the United States, where he died June 10, 1911, and the Honorable Paul Charlton having been duly appointed and qualified as his successor, on the 14th day of August, 1911, opened the April, 1911, term of said District Court for Porto Rico. Since the last-

mentioned date nothing further has transpired in that court in connection with this cause.

Meanwhile, on May 3, 1911, the transcript of the record in the cause, which *ex necessitati rei* does not contain any technical bill of exceptions, was filed in this court.

Defendant in error now moves to dismiss the writ of error because the record "contains no bill of exceptions," or to affirm the judgment of the court below because the writ of error "was taken for delay only."

ARGUMENT.

It is respectfully submitted that the motion to dismiss or affirm should be denied and as defendant in error by his said motion has made it necessary for the court to open the record we respectfully suggest and move upon the facts plainly appearing that the judgment of the District Court of Porto Rico which is drawn in question by the writ of error herein should be reversed and the cause remanded to said District Court for further proceedings.

I.

No question as to the jurisdiction either of this court or of the United States District Court for Porto Rico is involved.

II.

It plainly appears from the transcript of the record that the plaintiff in error duly tendered his bill of exceptions and that the same was being held under advisement by the learned trial judge at the date of his death.

Section 219 of the Code of Civil Procedure, Porto Rico, in force July 1, 1904, and at the date of the trial below, provides that—

> "A judge or judicial officer may settle and sign a bill of exceptions after as well as be-

> fore he ceases to be such judge or judicial officer. If such judge or judicial officer, before the bill of exceptions is settled, dies, is removed from office, becomes disqualified, is absent from said island, or refuses to settle the bill of exceptions, or if no mode is provided by law for the settlement of the same, it shall be settled and certified in such manner as the Supreme Court may by its orders or rules direct. Judges, judicial officers, and the Supreme Court shall respectively possess the same power, in settling and certifying statements, as is by this section conferred upon them in settling and certifying bills of exceptions."

These provisions are only applicable to trials before the United States District Court for Porto Rico, "as near as may be," and neither said district court nor said supreme court appear to have provided any further rules of their own on the subject. In such a case the general rule is that "where a party, without laches on his part, loses the benefit of his exceptions through the death or illness of the (trial) judge, a new trial will be granted."

> Hume *vs.* Bowie, 148 U. S., 245, 253, citing numerous cases.

Owing to the pendency of the cause in this court on a duly perfected writ of error, it has been thought to be at least undesirable to move for further proceedings in or before the United States District Court for Porto Rico.

III.

It is well settled that with respect to errors apparent on the record no formal or technical bill of exceptions is necessary to enable the appellate court to exercise its powers.

Mohne Plow Co. *vs.* Webb, 141 I. S., 616, 622, 623, citing:

Baltimore & Potomac R. R. *vs.* Trustees, &c., &c., 91 U. S., 127.

Bennett *vs.* Butterworth, 11 Howard, 669, 675.

Young *vs.* Martin, 8 Wallace, 354, 357.

Clinton *vs.* Missouri Pac., 122 U. S., 469, 474.

Here the plaintiff in error asserts and seasonably assigned as error the arbitrary action of the trial court "in overruling the motion of defendant for a reasonable time within which to prepare for the retrial of this (the) cause" (R., 15).

As above stated, contrary to established practice and without preliminary notice of intention so to do, the trial judge on December 2, 1910, set the case for retrial at ten o'clock on the following day. The attorney for defendant promptly made known to the trial court the absence of his witnesses from the place of trial and the impossibility of securing their attendance on such short notice and moved for a reasonable delay, "at least five days," to en-

able him to communicate with and bring such witnesses into court (R., 13). This motion was overruled and exception to the ruling was duly noted on the journal of the court (R., 13).

If such action of the trial judge was error, as we think it was, it is error apparent on the record and no bill of exceptions is necessary to secure its correction here.

The Constitution of the United States (article V, amendments) declares that "no person" within its protecting shadow "shall * * * be deprived of * * * property without due process of law."

To mulch a person, natural or artificial, by the judgment or decree of a court without having first afforded such person opportunity to be heard in defense is contrary to fundamental principles for the administration of justice and constitutes a denial of due process of law as understood and practiced in civilized and enlightened communities.

In Roller *vs.* Holly, 176 U. S., 398, the question was whether notice of a suit pending served on defendant in Virginia on December 30 requiring his appearance at the place of trial in Texas on January 5, such length of notice being in accord with the provisions of the Texas law, constituted due process of law within the meaning of the Fourteenth Amendment of the Constitution of the United States.

This court, speaking through Mr. Justice Brown, said:

(Page 409:)

"That a man is entitled to some notice before he can be deprived of his liberty or property is an axiom of the law to which no citation of authority would give additional weight; but upon the question of the length of such notice there is a singular dearth of judicial decision. It is manifest that the requirement of notice would be of no value whatever, unless such notice were reasonable and adequate for the purpose. *Davidson vs. New Orleans,* 96 U. S., 97; *Hagar vs. Reclamation District,* &c.,111 U. S.,701, 712. * * * In the case of a witness subpœna the command of the writ is that the party served shall lay aside all his business and excuses, and make his way to the court with the utmost dispatch, or at least present himself upon the return day of the writ. * * *

"The precise time (having regard to parties defendants) will generally depend on distance, and the other circumstances of each particular case. With analogy to other branches of the law, a man * * * (defendant) should be allowed not only ample time to obtain legal advice and assistance, *but also to collect his evidence, and even the convenience of witnesses should be considered* (italics ours); and therefore, in general, several days should intervene between the time of summons and hearing" * * * (Citing 2 Chitty's General Practice, 175).

It was held under the circumstances "and considering the distance between the place of service and the place of return, that five days was not a reasonable notice, or due process of law," and the

judgment of the lower court was reversed and the case remanded for further proceedings.

In Hovey *vs.* Elliott, 167 U. S., 409, where a defendant after answer filed refused to obey an order of the court and, by way of punishment for his contempt, his answer was stricken from the files and a decree *pro confesso* passed, this court held such decree void for want of due process of law, and speaking through its present Chief Justice, said (p. 414):

> "The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends." * * *

(Citing McVeigh *vs.* United States, 11 Wallace, 259:)

> "The order in effect denied the respondent a hearing. * * * The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice." * * * (And quoting from Windsor *vs.* McVeigh, 93 U. S., 277, as follows:)
>
> "* * * Wherever one is assailed in his person or his property, there he may de-

> fend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. Until notice is given, the court has no (p. 415) jurisdiction in any case to proceed to judgment. * * * But notice is only for the purpose of affording the party an opportunity of being heard upon the claim of the charges made. * * * A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. * * * It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict clothed in the form of a judicial sentence."

This language but expresses the most elementary conception of the judicial function. * * *

(Page 417:)

> "Can it be doubted that due process of law signifies a right to be heard in one's defense? * * * If this be true * * * how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution? If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution is

> the only one possessing power to disregard it. If such power exists then in consequence of their establishment, to compel obedience to the law and to enforce justice, courts possess the right to inflict the very wrongs which they were created to prevent."
> * * *

Upon this and much more equally as pointed and pertinent the judgment there assailed which had been rendered in disregard of the answer filed and of the proofs taken in its support, was held to be "void for want of jurisdiction" and subject therefore to collateral attack.

Other cases to the same effect might readily be cited, but consideration of those above would seem to afford sufficient precedent upon which to found a reversal of the judgment in the case at bar.

As in Hovey *vs.* Elliott, so in the case at bar, the proceedings seem to have been complicated with proceedings in or for contempts (see Record, page 18, second phrase of first sentence). Whether the contempts were of party or counsel, and the character thereof does not appear, but it would probably not be amiss to surmise that whatever their character or source they probably gave rise to some personal illfeeling even on the part of the learned trial judge, and may have conduced to the more ready making of the seemingly arbitrary and unjudicial orders of December 2 and 3, which in effect denied the defendant opportunity to present its defense by witnesses cognizant of the facts which concern the plaintiff's claim.

It cannot be that the defendant was in fault because at the conclusion of the first trial its witnesses were permitted to return to their homes and to their respective occupations. Such as appears from the motion for delay had theretofore been the unbroken custom in the Federal District Court for Porto Rico from its establishment. The facilities for communication and travel between the place of trial and the place of their residence were such as precluded their immediate return to the former. To deny the reasonable time necessary to secure their attendance was to deny defendant opportunity to be heard in its defense, and the entry of judgment against it in the absence of such hearing was but to deprive it of its property without due process of law.

Further argument of the facts which the record so plainly discloses and about which there neither is nor can be room for controversy, would seem to be useless.

We therefore submit, in the interest of justice and for the preservation of the fair fame of her courts, the judgment at bar should be reversed and the cause remanded whence it came for further proceedings.

FREDERIC D. MCKENNEY,
JOHN SPALDING FLANNERY,
WILLIAM HITZ,
Attorneys for Plaintiff in Error.

NOVEMBER, 1912.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 280.

THE GUARDIAN ASSURANCE COMPANY, LTD., OF LONDON, *Plaintiff in Error,*

vs.

DOMINGO QUINTANA, *Defendant in Error.*

Affidavit.

Francis H. Dexter, being duly sworn, upon his oath says that he is a member of the bar of the District Court of the United States for Porto Rico, and that he is one of the attorneys for the plaintiff in error.

He further states that the Honorable Judge John J. Jenkins, former judge of the District Court of the United States for Porto Rico, departed from Porto Rico upon the occasion of his last illness on the fifth day of April, 1911, and that he died on the tenth day of June, 1911, as affiant has been informed by friends of the said judge and as appears by other data.

FRANCIS H. DEXTER.

Subscribed and sworn to before me this first day of November, 1912.

[SEAL.] RAFAEL GUILLERMELY,
By L. A. GROSS, *Deputy.*

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 280.

THE GUARDIAN ASSURANCE CO., LTD., OF LONDON,
PLAINTIFF IN ERROR,

vs.

DOMINGO QUINTANA, DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM.

The plaintiff in error opposes the granting of this motion to dismiss or affirm on two grounds:

1. That it was through no fault of the plaintiff in error that the bill of exceptions was not settled, but because the judge to whom it was submitted for settlement died before it was settled; that there was no procedural machinery in the Supreme Court of Porto Rico which under section 914 of Revised Statutes the Federal court of that district was to follow "as near as may be" to meet this situation; that plaintiff in error was therefore left in the position of having

"lost the benefit of his exceptions" without his fault, and, consequently, he is entitled to a new trial under the "general rule."

The presence or absence of rules in the Supreme Court of Porto Rico governing the settlement of bills of exceptions in no way affected the situation which confronted the plaintiff in error when Judge Jenkins died leaving the bill unsettled. It is settled law that the practice and rules of State courts do not apply to proceedings taken for the purpose of reviewing in this court a judgment rendered in the lower Federal courts, and that such rules and practice, embracing the preparation, perfecting, settling, and signing of a bill of exceptions, are not within the practice, pleadings, and forms and modes of proceeding in the Federal courts which are required by section 914 to conform "as near as may be" to the practice in the courts of record of the various States. Such proceedings are to be regulated by acts of Congress or, when they are silent, by methods derived from the common law or from the rules and practice of the courts of the United States (*Ex parte* Chateaugay Ore and Iron Co., 128 U. S., 544, 553, 555; 32 Law Ed., 508, 511, 512; Nudd *vs.* Burrows, 91 U. S., 426; 23 L. Ed, 286; Indianapolis, etc., Ry. Co. *vs.* Horst, 93 U. S., 291; 23 Law Ed., 898).

Plaintiff in error states that "in such a case as this" the general rule is that a new trial will be granted, and cites Hume *vs.* Bowie, 148 U. S., 245, 253, in support of this contention. Hume *vs.* Bowie is not, however, such a case as this and does not afford an example of the application of the general rule. In that case the judge died before the bill of exceptions was settled, and rule 64 of the Supreme Court of the District of Columbia specially provided that when a judge was unable to settle a bill of exceptions and the parties were unable by their counsel to do so a new trial was to follow as a matter of course.

The general rule was there stated by Chief Justice Fuller in the following terms: "Ordinarily where a party without

laches on his part loses the benefit of his exceptions through the death or illness of the judge a new trial will be granted." Here no rights were lost by the plaintiff in error because, as appears of record, the judge ordered that the matter of the settlement of the bill of exceptions be continued to the April term, 1911 (R., 18). It might have been otherwise had there been no such order, had the plaintiff in error been restricted to a settlement within the same term, had there been no laches on his part, and had the death of the judge been the sole obstacle standing in the way of the settlement. Defendant's right to settle being extended until the following term, it is idle to contend that the death of the judge who ordered the continuance could leave the defendant in the position of having no remedy except a new trial as is argued here. Another judge was appointed before whom the matter should in due course have been taken up who, as the successor of his predecessor, could exercise the same powers and had the right to act upon every case that remained undecided upon the docket as fully as his predecessor could have done (re Life and Fire Insurance Co. *vs.* Wilson, 8 Peters 292; 8 Law Ed., 949, 953, and for cases holding that a succeeding judge can settle and sign bill of exceptions left unsettled by his predecessor see Bowden *vs.* Wilson, 21 Florida, 168; Ketcham *vs.* Hill, 42 Indiana, 70).

The above considerations are, however, more or less beside the point since, as plaintiff in error points out in his brief (p. 8), he elected to have the rights he claims decided by this court on the record which he has presented, in preference to availing himself of the opportunity to settle his bill of exceptions afforded by the order of continuance issued by the court below, and of the opportunity to file it as part of the record here in compliance with both the words and spirit of the order issued by this court when it denied the motion of the defendant in error to docket and dismiss.

II. That the absence of the bill of exceptions affords no ground for dismissal, since on the record presented there is

an obvious error of which this court will take notice and decide accordingly.

The record shows that on December 3, 1910, when the case was set for retrial, the attorney for the defendant below moved for a continuance of at least five days, alleging as grounds for such motion that he could not properly prepare his case and assemble his witnesses before that time. The court denied the motion, attorney for the defendant retired from the court room, the trial was had, and a verdict for $7,000 was sent in. This, counsel contends, was a deprivation of the constitutional right to a hearing, to which defendant was entitled, and constitutes the obvious error assigned.

Counsel cites the case of Roller *vs.* Holly, 176 U. S., 398, the salient facts of which are set out on page 10 of his brief, in support of this contention. But he overlooks the point that in that case the facts were so presented to this court that it was enabled to review them. They became incorporated in the record on an agreed statement of facts, which is distinctly not the case here.

This court has repeatedly held that an affidavit offered in a case is not part of the record unless brought up by an agreed statement of facts, special verdict or bill of exceptions (Clune *vs.* U. S., 159 U. S., 590; 40 Law Ed., 269; Nelson *vs.* Flint, 166 U. S., 226; 41 Law Ed., 1002; Evans *vs.* Stettnisch, 149 U. S., 605; 37 Law Ed., 866).

In the recent case of Pickett *vs.* United States (216 U. S., 458, 461; 54 Law Ed., 566, 569), this court said:

> "The remainder (of the assignments of error) is for denying a continuance. Continuances are within the discretion of the court, and unless great abuse is shown the action of the court below will not be disturbed. As no bill of exceptions was taken we have no showing of abuse upon which the action of this court may be invoked" (see also Isaacs *vs.* U. S., 159 U. S., 487; 40 Law Ed., 229; Goldsby *vs.* U. S., 160 U. S., 70; 40 Law Ed., 344; Campbell *vs.* Rankin, 98

U. S., 261; 25 Law Ed., 435; Hannah *vs.* Maas, 122 U. S., 24; 30 Law Ed., 1117; United States *vs.* Taylor, 147 U. S., 695; 30 Law Ed., 335; Baltimore and Potomac Ry. Co. *vs.* Trustees, etc., 91 U. S., 127; Freeman on Judgments, sec. 79).

Counsel contends that the court below abused its powers, and desires this court to act in accordance with this assumption. But this court is limited in the exercise of its powers of review to what is before it in the record. All that is before it is that the defendant below moved for a continuance, which was denied by the trial court.

This is but the exercise of the ordinary discretionary powers of a trial court, and therefore does not *per se* constitute error on the face of the record. As the cases above cited show, abuse of these powers is not to be presumed; the only way to show such abuse is to incorporate the facts substantiating it in the record in the methods provided by law. As this was not done the question is not presented here.

Prayer for Damages.

Defendant in error respectfully prays the court, in view of the above representations, to award damages in his favor to the extent of 10 per cent of the judgment rendered by the District Court of Porto Rico, together with interest running from the date of said judgment. That the writ of error was taken for purposes of delay only is, it is thought, made plainly manifest by the following facts which appear of record:

First. Plaintiff in error failed to docket his case within the time prescribed by rule 9 of this court, and made no effort to obtain an extension of time on or before the expiration of that period.

Second. When in accordance with the order of this court of April 24, 1911, plaintiff in error was granted a reasonable time to docket his case after settling the bill of exceptions, he

made no effort whatsoever to comply with the order of this court and settle said bill, which he was enabled to do [although after the expiration of the term in which it properly came up for settlement] both by this court's order of April 24, 1911, and by the order of the district judge of April 4, 1911. It is obvious that he never intended to comply with the spirit of the order of this court, nor to avail himself of the opportunity afforded by the district judge to settle the bill of exceptions in the following term, for he caused to be docketed on May 3, 1911, the record in this cause containing no bill of exceptions whatsoever. On page 6 of his brief counsel states that the transcript of record, *ex necessitati rei*, does not contain any bill of exceptions. This would be true only on the assumption that plaintiff in error was in duty bound to docket the case at that time; but he was, under the order of this court of April 24, 1911, not only at liberty to wait until the ensuing term to settle the bill before docketing it, but he was both by the order of this court and the order of the district judge morally bound to do so. The death of the district judge had nothing to do with his precipitous action, because Judge Jenkins did not die until five weeks after the case was docketed. It seems perfectly plain that the failure of this record to contain a bill of exceptions arose not, as is contended, from the necessity of the case, but from a wilful disregard of the spirit of the order of this court of April 24, 1911, and of the rights which plaintiff in error might have exercised had he chosen to settle the bill of the ensuing term as allowed by the order of the district judge.

Third. As appears from page 4 of the brief of defendant in error in support of this motion, plaintiff in error disregarded the duty imposed upon him by rule 8, paragraph 1, to serve the defendant in error or his counsel with a copy of the *præcipe* filed with the clerk of the court indicating the portions of the record to be incorporated into the transcript on appeal.

Fourth. Ever since the 14th day of August, 1911, on which the April term of the District Court for Porto Rico was opened by the judge who succeeded Judge Jenkins, it was within the power of the plaintiff in error to at least attempt to bring about the settlement of the bill of exceptions contemplated by the order of this court of April 24, 1911. As shown by the affidavit of the clerk of the District Court of Porto Rico, quoted in full on pages 6 and 7 of the original brief filed in support of this motion, no attempt of any kind whatsoever has been made by the plaintiff in error. It is thought that the above facts are more than sufficient to show that the writ of error was applied for for purposes of delay only and under circumstances which fully justify the prayer for damages above presented. On this particular point the undersigned begs to refer the court to the following decisions: West Wisconsin Ry. Co. *vs.* Foley, 94 U. S., 100; 24 Law Ed., 71; Hennessy *vs.* Sheldon, 12 Wallace, 440; 20 Law Ed., 446; Nelson *vs.* Flint, 176 U. S., 266; 41 Law Ed., 1002.

Respectfully submitted,

CLEMENT L. BOUVÉ,
For Defendant in Error.

GUARDIAN ASSURANCE COMPANY OF LONDON v. QUINTANA.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

No. 280. Argued January 6, 7, 1913.—Decided January 27, 1913.

Ordinarily the granting or refusing of a continuance is within the discretion of the trial court and will only be interfered with by this court in a clear case of abuse; but in this case the assertion of error based upon the refusal to continue has some foundation, and is not merely frivolous, so the motion to affirm is denied.

Section 953, Rev. Stat., confers authority on, and makes it the duty of, a judge of the Federal court to settle controversies concerning the bill of exceptions in a case tried before his successor who is, by reason of death or disability, unable to do so; and this applies to the judge of the District Court of the United States for Porto Rico.

While it is the duty of plaintiff in error to obtain the approval of the bill of exceptions by the judge who tried the case, or, in case of his

death or disability, by his successor, there are circumstances under which delay will be excused; and a motion to dismiss under Rule 9 for failure to file the bill denied, so as to give the plaintiff in error reasonable opportunity to have the bill settled.

In this case, the trial judge having died and neither party having moved for a settlement of the bill by his successor, and there having heretofore been room for doubt as to whether § 953, Rev. Stat., governs this case, the motion to dismiss is denied, but without prejudice to renew if plaintiff in error does not within a reasonable time seek a settlement of the bill.

Where a transcript of record has been filed for purposes of a motion to dismiss for want of bill of exceptions, which is denied without prejudice, the bill when settled, or the reasons for failure to obtain its settlement, can be included in a supplementary transcript.

THE facts are stated in the opinion.

Mr. C. L. Bouvé with whom *Mr. Hector H. Scoville* was on the brief, for defendant in error, in support of motion to dismiss or affirm.

Mr. Frederic D. McKenney, with whom *Mr. J. Spalding Flannery* and *Mr. William Hitz* were on the brief, for plaintiff in error, in opposition thereto.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

In 1911 defendant in error moved under Rule 9 to docket and dismiss the writ of error for failure to file the record. Plaintiff in error opposed because a bill of exceptions was yet unsettled in the hands of the court below, and the motion was, on April 3, 1911, denied "without prejudice to a renewal of same if case is not docketed within a reasonable time after the bill of exceptions is settled." Shortly thereafter, on May 3, 1911, there was filed as a transcript a paper containing the pleadings and certain journal entries and other documents purporting

to relate to proceedings had in the cause in the court below and to certain steps stated to have been taken concerning a bill of exceptions, there being, however, no such bill in the record. Putting out of view the statements made exhibiting the facts and circumstances which gave rise to the reserving of an exception and the preparation of a bill of exceptions and the effort to settle the same, and looking only at the pleadings and journal entries properly embraced in the record, the following is shown:

The suit, on November 29, 1910, was tried, resulting in a failure of the jury to agree. On December 2, 1910, the case was set for re-trial at 10 A. M. on the following day. When the case was called for trial defendant asked a postponement "on account of the short time at his disposal to prepare the defense in the case." On this request being denied an exception was taken and the counsel for the defendant withdrew. After the introduction of evidence for the plaintiff the jury, as instructed by the court, returned a verdict for the plaintiff, upon which judgment was entered. It is to this judgment that the writ of error is directed, it having been allowed by the trial judge shortly after the trial, a supersedeas bond having been also approved about the same time. The assignment of errors was based solely on error asserted to have been committed in refusing the request to continue the case. It appears also from the record that a bill of exceptions was tendered to the court for approval, which bill presumably contained a statement of the facts connected with the refusal of the continuance which were relied upon to sustain the assignment of error made on that subject.

The matter is again before us on a motion to dismiss because there is nothing within our jurisdiction to review, as there is no bill of exceptions, or to affirm, because of the wholly frivolous and unsubstantial character of the ground of error relied upon, that is, the failure of the court below to grant a continuance.

It is obvious that these propositions, inherently considered, rest upon an identical foundation (*Deming* v. *Carlisle Packing Company*, 226 U. S. 102), and we come to dispose of them in that aspect, considering first the more far-reaching of the two, that is, the asserted frivolous character of the error relied upon. We must of course approach the subject upon the assumption that it is urged upon the hypothesis that the record is in such a state as to justify us in disposing of the matter. This assumption must be indulged because if it is not there would be no way of testing the merits of the contention and it would consequently resolve itself into a mere change in the form of stating the proposition that because there was no bill of exceptions there was nothing for consideration. Coming to test the question of the frivolity of the error relied upon in the light of the assumption just stated, we deem it necessary merely to outline the facts which it is insisted would have been disclosed had a bill of exceptions been settled, as follows: After the failure of the jury to agree, in reliance upon what was asserted to be a practice which had prevailed from the organization of the court, where there had been a disagreement of the jury, to carry a case over for trial before another venire at the following term, the witnesses for the defendant were discharged and allowed to depart for their homes; and on the assigning of the case for a re-trial the request for continuance was based on the physical impossibility of bringing the witnesses back in time to be heard, and to enable that purpose to be accomplished a continuance of five days was prayed and refused. Under this assumed state of facts we content ourselves with saying that there is no room for holding that the assertion of error based upon the refusal to continue was so devoid of foundation as to be merely frivolous in character. We say this because while the elementary rule is that the granting or refusing of a continuance is within the discretion of a trial court, a discre-

tion which will not be lightly interfered with, it is equally elementary that where it is manifest that there has been a plain abuse of discretion the duty to correct arises.

This brings us to the motion to dismiss, and its determination depends on the facts concerning the alleged bill of exceptions and whether there has been such laches on that subject as to require a dismissal.

The mistrial, the assignment for a re-trial, the application for a continuance and its refusal and the reserving of an exception, the verdict and judgment and the allowance of the writ of error and the tendering of a bill of exceptions on the subject for settlement as shown by the record have already been stated in detail and we need not repeat those statements. Certain is it that the bill remained unsettled in the hands of the court when the previous order of this court declining to dismiss for want of filing of the record was entered. Indeed, it is shown by the record that on the fourth of April, 1911, the day after the previous application to dismiss because of the want of a bill of exceptions was by this court denied, the court below entered the following order:

"In view of the illness of the Judge of this Court it is hereby ordered that the allowance and approval of the Bill of Exceptions in the above entitled cause, heretofore under consideration, is hereby continued over to the approaching April term of this Court."

It is conceded by counsel for both parties that Judge Jenkins, who thus continued the hearing of the controversy, never further acted upon the matter, because shortly after he left Porto Rico for the United States, where he remained until his death in the following June. It is likewise conceded that the successor in office to Judge Jenkins—Judge Charlton—was appointed and held the court from August 14, 1911, until October 7, 1911, and a further term from October 9, 1911, until April 13, 1912. There is also a certificate of the clerk contained

in the motion papers to the effect that no steps were taken by anyone to procure action by Judge Charlton looking to the settlement of the bill of exceptions. And it is the neglect during the time stated to press for a settlement of the bill of exceptions by Judge Charlton which forms the basis of the laches which it is insisted requires a dismissal of the writ of error. While insisting on laches, it is admitted (citing *Hume* v. *Bowie*, 148 U. S. 245, 253) that if there was no legal possibility of having the bill of exceptions settled and the right thereto was lost without any fault on the part of the plaintiff in error, the duty would obtain to grant a new trial.

Passing the consideration of whether the provisions of § 219 of the Code of Civil Procedure of Porto Rico, copied in the margin,[1] are applicable to the District Court of the United States for Porto Rico (see *Chateaugay Iron Co., Petitioner*, 128 U. S. 544), and whether, if applicable, the adoption of rules on the subject was essential to give it full efficacy, we are of opinion that § 953 of the Revised Statutes, also copied in the margin,[2] conferred authority

[1] A judge or judicial officer may settle and sign a bill of exceptions after as well as before he ceases to be such judge or judicial officer. If such judge or judicial officer, before the bill of exceptions is settled, dies, is removed from office, becomes disqualified, is absent from said island, or refuses to settle the bill of exceptions, or if no mode is provided by law for the settlement of the same, it shall be settled and certified in such manner as the Supreme Court may by its orders or rules direct. Judges, judicial officers, and the Supreme Court shall respectively possess the same power, in settling and certifying statements, as is by this section conferred upon them in settling and certifying bills of exceptions.

[2] That a bill of exceptions allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof if more than one judge sat on the trial of the cause, without any seal of the court or judge annexed thereto. And in case the judge before whom the cause has heretofore been or may hereafter be tried is, by reason of death, sickness, or other disability, unable to hear and pass upon the motion

and made it the duty, if possible, of any judge of the court below, successor in office to Judge Jenkins, to consider and settle the controversy concerning the bill of exceptions. Although of this opinion, we do not think our duty exacts under the circumstances of this case that we dismiss for the want of a bill of exceptions. On the contrary we are of opinion that our duty is to afford an opportunity to the parties to avail of the provisions of Rev. Stat., § 953, so that the record may be completed, to the end that the merits of the writ of error may be disposed of. Briefly stated, we reach this conclusion for the following reasons: 1, because we think there is no just ground for treating our previous order as an affirmative direction to seek the settlement of the bill of exceptions from the successor in office of Judge Jenkins, because at the time that order was entered Judge Jenkins was discharging his duties, and in fact the order, continuing over the term the settlement of the bill of exceptions, was made by him, while the previous motion to dismiss was here under consideration; 2, because there was some reason for considering that the provision of the Porto Rican Code to which we have referred did not apply to proceedings in the court below, and there was also some

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for a new trial and allow and sign said bill of exceptions, then the judge who succeeds said trial judge, or any other judge of the court in which the cause was tried, holding such court thereafter, if the evidence in such cause has been or is taken in stenographic notes, or if the said judge is satisfied by any other means that he can pass upon such motion and allow a true bill of exceptions, shall pass upon said motion and allow and sign such bill of exceptions; and his ruling upon such motion and allowance and signing of such bill of exceptions shall be as valid as if such ruling and allowance and signing of such bill of exceptions had been made by the judge before whom such cause was tried; but in case said judge is satisfied that owing to the fact that he did not preside at the trial, or for any other cause, that he cannot fairly pass upon said motion, and allow and sign said bill of exceptions, then he may in his discretion grant a new trial to the party moving therefor.

room for reasonable doubt as to whether the provisions of Rev. Stat., § 953, governed the matter in hand, thereby rebutting the inference that the mere failure to apply to the successor of Judge Jenkins for a settlement of the bill of exceptions was either a waiver of the writ of error or an election to stand upon the imperfect record as filed in this court without reference to the settlement of the bill of exceptions; 3, because the delay in the settling of the bill of exceptions obviously, in part at least, arose from the objection of defendant in error, plaintiff below, who equally with plaintiff in error took no steps after the order of this court overruling the prior motion to dismiss and the death of Judge Jenkins, to have the bill settled by his successor; 4, because the failure of the court to instruct a verdict on the first trial and the disagreement of the jury all serve to indicate that the defense may not have been wholly devoid of merit; and, 5, because if the facts stated extraneous to the record concerning the bill of exceptions, which we have noticed for the purpose of the motion to affirm, be taken as true, it might result that a dismissal for want of a settlement of the bill of exceptions would occasion injustice, amounting to a possible condemnation without a reasonable opportunity to be heard. Indeed, the admonition which arises from this last consideration is cogently reënforced when the subject-matter to which the bill of exceptions related, the mere refusal to grant a continuance, is taken into view, and the long delay and presumed hesitancy which followed in settling the bill of exceptions are borne in mind.

We shall, therefore, refuse the motion both to dismiss and affirm, without prejudice, however, to the right to renew the same unless plaintiff in error within a reasonable time applies to and diligently seeks the settlement of the bill of exceptions at the hands of the successor in office of Judge Jenkins or any judge empowered by assignment

or otherwise to discharge the duties of a judge of the court below.[1] And we further direct that the bill of exceptions when settled shall be promptly included in a supplementary transcript of record, or the reasons for a failure to settle the bill, if the judge below finds it impossible to do so, be certified to this court.

Motion to dismiss or affirm denied without prejudice.